92-1893
CASE NO. —

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1992

PRINCIPAL MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

MCORP,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After commencing the decisional process on a petition for writ of mandamus, must an appellate court explain to the public the rationale for refusing to disqualify a federal district judge?

LIST OF PARTIES IN THE PROCEEDINGS IN THE COURT OF APPEALS

1. Principal Mutual Life Insurance Company.

2. MCorp, MCorp Management, and MCorp Financial, Inc.

3. Certain Senior Note Claim Holders: Farallon Capital Management Partners, L.P., Baker, Nye Advisers, Perry Partners, Angelo/Gordon and M.H. Davidson and Co., Inc., as Agent.

4. Certain Junior Note Claim Holders: APS Financial Corp. and Morgens Waterfall & Vintiadis.

5. Official Committee of Unsecured Creditors for MCorp, MCorp Financial, Inc. and MCorp Management.

6. Shearson Lehman Brothers, Inc.

7. The Federal Deposit Insurance Corporation, as Receiver for MBank Dallas, N.A.

8. The Honorable Lynn N. Hughes, United States District Judge, Southern District of Texas, Houston Division

ADDITIONAL PERSONS (NOT PARTIES) HAVING AN INTEREST IN THE CASE

9. MCorp Properties, a wholly-owned subsidiary of MCorp.

10. Elm Block Development Limited Partnership, a Texas Limited Partnership.

11. The Prentiss/Copley Investment Group, a Delaware Joint Venture.

ADDITIONAL PERSONS (NOT PARTIES) HAVING AN INTEREST IN THE CASE – Continued

12. CF Elm Development, Inc., a Delaware Corporation.

13. Tower Center Development Associates Limited Partnership.

14. Bank One, Texas, N.A.

CORPORATE DISCLOSURE STATEMENT

Principal Mutual hereby certifies that it does not have a parent company and it has no subsidiaries or affiliates that have issued shares to the public, except the following Mutual Funds organized by Principal Mutual Life Insurance Company:

Princor Aggressive Growth Fund, Inc.
Principal Aggressive Growth Fund, Inc.
Princor Blue Chip Fund, Inc.
Princor Bond Fund, Inc.
Principal Bond Fund, Inc.
Princor Capital Accumulation Fund, Inc.
Principal Capital Accumulation Fund, Inc.
Princor Cash Management Fund, Inc.
Principal Money Market Fund, Inc.
Princor Government Securities Income Fund, Inc.
Principal Government Securities Fund, Inc.
Princor Growth Fund, Inc.
Princor High Yield Fund, Inc.
Principal High Yield Fund, Inc.
Princor Managed Fund, Inc.
Principal Managed Fund, Inc.
Princor Tax-exempt Bond Fund, Inc.
Princor Tax-exempt Cash Management Fund, Inc.
Princor World Fund, Inc.

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CASE NO. ___

In The

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October Term, 1992

PRINCIPAL MUTUAL LIFE
INSURANCE COMPANY,

Petitioner,

vs.

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Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Principal Mutual Life Insurance Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit. After commencing the decisional process by requiring responses and oral argument, a split panel of the Court of Appeals denied a petition for a writ of mandamus in which Petitioner sought disqualification of a federal judge. The Court of Appeals failed to issue a written opinion to explain its rationale for denying the petition.

OPINIONS BELOW

The orders entered by the Court of Appeals are attached as Appendix A to this petition. The district court's oral findings and order denying the motion for disqualification appear as Appendix B.

JURISDICTION

This proceeding was commenced by a Petition for Writ of Mandamus or Prohibition in the Court of Appeals under the All Writs Statute. *28 U.S.C. § 1651(a).* The Court of Appeals entered judgment on March 23, 1993. A petition for rehearing was timely filed on April 6, 1993. On April 12, 1993, the Court of Appeals denied the petition for rehearing. This Court may review the Court of Appeals' decision by writ of certiorari. *28 U.S.C. § 1254(1). See Schlayenhauf v. Holder,* 379 U.S. 104, 109 (1964) (certiorari granted to review split decision of court of appeals denying petition for writ of mandamus). This Court also has jurisdiction of this case under the All Writs Statute. *28 U.S.C. § 1651(a).*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution, 28 U.S.C. § 144 and 28 U.S.C. § 455(a),(b)(1),(e) are set forth in Appendix C.

STATEMENT OF THE CASE

This proceeding arises out of the bankruptcy case of MCorp pending in the United States Bankruptcy Court for the Southern District of Texas pursuant to 28 U.S.C. §§ 1334, 157. Petitioner asserts claims in excess of $52 million against MCorp. MCorp filed objections to Petitioner's claims, and the trial of these objections was approximately one-half completed before the bankruptcy judge when, on February 10, 1993, the Honorable Lynn N. Hughes, United States District Judge, *sua sponte* partially withdrew the reference of the bankruptcy case for approval of a disclosure statement and confirmation of a plan. *28 U.S.C. § 157(d).*

There is a dispute in the case over the amount to be reserved by any plan for Petitioner's contested claims pending a final resolution of the claims objection, including appeals. Another dispute in the case involves the division of estate assets between senior creditors and junior creditors.

After withdrawing the reference, the District Judge directed the most significant parties to conduct settlement negotiations to resolve these disputes and instructed the attorneys for MCorp and the senior creditors to report their progress to the court every other day. The District Judge left to the parties the manner in which the negotiations were to be conducted. Petitioner's attorney was advised that the junior creditors and the senior creditors would negotiate first between themselves and then with Petitioner following those negotiations.

Without Petitioner's knowledge, the negotiation and reporting process altered and became an informal mediation with the District Judge serving as the mediator and conducting separate *ex parte* meetings with various parties. *(Response of District Judge at 2-3).* The District Judge met separately and jointly with the principals of MCorp, the senior creditors, the junior creditors, and their attorneys. These meetings lasted thirty-six hours. *(Response of District Judge at 3).* The District Judge approved the exclusion of Petitioner from the mediation. *(Tr. March 3, 1993, pp. 4:19-5:8).*

At a status conference on March 12, 1993 the District Judge invited Petitioner to join in the final stages of the "mediation and negotiation process" with the Court. *(Tr. March 12, 1993, p. 2:13).* At this time, Petitioner first learned the extent of the District Judge's participation, and Petitioner expressed concern. The District Judge explained he already had heard "thirty-seven views" of Petitioner's claims and he did not believe *ex parte* discussions with Petitioner could do further damage. *(Tr., March 12, 1993, pp. 4:20-23).* During a recess of the March 12, 1993 status conference, a participant to the mediation informed Petitioner that one of the terms of the settlement mediated by the District Judge was that Petitioner's claims would be limited to $5 million. *(Section 144 Affidavit of Prejudice of Douglas Achtemeier, Principal Mutual's Motion for Recusal of District Judge and Supporting Brief attached to Petition for Writ of Mandamus).* Declarations filed in the Court of Appeals by participants to the mediation provide more details of what occurred. *(Burke, Waterfall, Gorman, Harris, and Morgan Declarations).* During the mediation, a key issue between the junior and senior creditors was the amount in which Petitioner's

claims might be allowed because the amount of Petitioner's claims potentially reduced the junior creditors' recovery under the mediated settlement. The junior creditors apparently refused to settle if Petitioner's claims exceeded $5 million. According to the Declarations, the District Judge, after conferring privately with MCorp's chief officer, announced to the representatives of the junior creditors that Petitioner's claims were worth only $4 million dollars, that he would give Petitioner a claim of $5 million dollars, and that Petitioner's claims would be capped at $5 million and that the rest of the money would be paid out to other creditors so that Petitioner could not attempt to grab it. He also stated that he would begin estimation proceedings for Petitioner's claims no later than March 15, 1993. *(Burke, Waterfall and Gorman Declarations).*

Petitioner declined the District Judge's invitation to participate in the mediation and meet separately with him. The District Judge then set the estimation of Petitioner's contested claims for hearing at 5:00 p.m. on March 15, 1993, the next business day.

On March 15, 1993, Petitioner filed its motion to disqualify the District Judge, asserting among other grounds that a reasonable person would question the District Judge's impartiality. *U.S. Const. amend. V; 28 U.S.C. §§ 144, 455(a),(b)(1),(e); Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859 (1988). The District Judge denied the motion to disqualify and, over Petitioner's objections, proceeded with the estimation of Petitioner's claims.

DISPOSITION IN THE COURT OF APPEALS

On March 16, 1993, Petitioner filed with the Court of Appeals its emergency petition for writ of mandamus or writ of prohibition seeking disqualification of the District Judge. The Court of Appeals reviewed the case under the All Writs Statute. *28 U.S.C. § 1651(a).*

The Court of Appeals directed MCorp, the creditors committee, the senior creditors and the junior creditors to file responses. After hearing oral argument and taking a recess, the Court orally announced from the bench that the majority denied the petition. This announcement was not recorded. Judge DeMoss dissented, stating that he would require the District Judge's recusal from the estimation of Petitioner's claims.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three reasons. First, the failure of the Court of Appeals to issue an opinion or findings of fact and conclusions of law conflicts with the reasoning of this Court's precedent, although this Court has not specifically addressed the issue. Second, the Court of Appeals implicitly approved the District Judge's action without a rationale which the public could review. This lack of explanation hinders review by this Court, fails to guide other courts in the circuit and undermines the public confidence in the federal judiciary. Third, the decision not to write an opinion appears to conflict with a decision of the Court of Appeals for the District of Columbia.

I. THE FAILURE OF THE COURT OF APPEALS TO ISSUE FINDINGS OF FACT AND CONCLUSIONS OF LAW CONFLICTS WITH THE REASONING OF THIS COURT'S PRECEDENT.

Unlike an appeal, which contains questions of law, the writ of mandamus involves an exercise of the appellate court's discretion. Trial courts are required to issue findings of fact and conclusions of law when they exercise their discretion. *Fed. R. Civ. P.* 52. This Court has imposed a similar requirement for appellate courts when they exercise their discretion. In *Will v. United States*, 389 U.S. 90 (1967), the court of appeals had issued a writ of mandamus requiring the district judge to vacate an order directing the government to supply information about its witnesses. *Will*, 389 U.S. at 94. This Court vacated the issuance of the writ because the record did not support its issuance and because the court of appeals failed to make findings of fact and conclusions of law. *Will*, 389 U.S. at 102-07.

Noting the issuance of a writ of mandamus was committed to the discretion of the court of appeals, this Court stated that without an opinion it could not evaluate the appellate court's ruling. *Will*, 389 U.S. at 105 (citing *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 258 (1957)). The Court explained that a writ "serves a vital corrective and didactic function." *Will*, 389 U.S. at 107. "A mandamus from the blue without rationale is tantamount to an abdication of the . . . expository and supervisory functions of an appellate court. . . . " *Will*, 389 U.S. at 107.

Petitioner recognizes the issuance of a writ is distinguishable from the denial of a writ, and Petitioner does

not contend that every denial of a petition for a writ of mandamus merits an explanation from the Court of Appeals. However, this Court's concerns in *Will* apply to the facts of this case, where the issue was briefed by all parties and oral argument heard. First, this Court recognized that the writ process has a didactic purpose and that a publicly available rationale ensures the appellate court is not abdicating its expository and supervisory role in that process. In this case, a rationale would prevent public perception that the Court of Appeals approves the District Judge's extreme departure from the usual course of judicial proceedings. *(See paragraph II, p. 9 below).* With the passage of the Civil Justice Expense and Delay Reduction Plan, *28 U.S.C. § 473,* mediation has increased in frequency and importance. Both the public and the courts would benefit from a rationale in this case because it would offer guidance on the statute's implementation and the court's proper role in the mediation process. Second, this Court vacated the writ of mandamus in *Will* because the record alone did not show the reasons for the appellate court's granting of the writ. Similarly, the record in this case does not suggest the reasons for the denial of the writ, particularly since Judge DeMoss would have granted it.

It is impossible to determine if the Court of Appeals for the Fifth Circuit considered factors such as the practice of the district courts in their region, or if the Court disagreed with the Third Circuit's determination that harm to the public's confidence in the judiciary is sufficient to warrant issuance of the writ. *Pfizer, Inc. v. Kelly (In re School Asbestos Litigation),* 977 F.2d 764 (3d Cir. 1992). The Court of Appeals has chosen to exercise its

discretion not to issue the writ, but the public, the other courts within the Fifth Circuit, Petitioner and this Court should be told the basis of that decision. The requirement of a written rationale is consistent with the supervisory and expository function of the appellate courts.

II. THE FAILURE OF THE COURT OF APPEALS TO ISSUE FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THIS CASE IMPLICITLY APPROVES EXTREME DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS.

The decision of the Court of Appeals not to explain its rationale implicitly approves the District Judge's actions. The District Judge deviated from the normal course of judicial proceedings when he violated Canon 3(A)(4) of the Code of Conduct for United States Judges by meeting separately with selected parties and by acting as a mediator without the consent of all the parties. *Code of Conduct for United States Judges, Canon 3(A)(4) (1992).* This deviation violated Petitioner's due process rights and harmed Petitioner and the public because a reasonable person would perceive that the District Judge served in a partisan capacity when promoting his mediated settlement and in a judicial capacity when estimating Petitioner's claims. *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813 (1986); *Tumey v. Ohio,* 273 U.S. 510 (1927). Moreover, the conduct violated the statutes which have been designed to expand and enforce those due process rights. *28 U.S.C. §§ 144, 455.* Under section 144 and section 455, the District Judge is disqualified if a reasonable person would believe Petitioner could not receive a fair trial under the facts. *Liljeberg v. Health Services Acquisition Corp.,* 486 U.S.

847, 859-60 (1988); *Chitimaca Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983).

By failing to issue findings of fact and conclusions of law in this case, the Court of Appeals approved the action of the District Judge. The MCorp bankruptcies are large bankruptcies with approximately $400 million in assets. They have received media coverage and attention in the legal community. When the Court of Appeals denied the writ, it indicated to the judges of the Fifth Circuit and to the public that judges may try cases after improperly mediating the dispute without the consent of all the parties. The action of the Court of Appeals will not go unnoticed.

This Court has recognized that providing relief in cases where there is an appearance of impropriety encourages litigants and judges to scrutinize possible grounds for disqualification and disclose them. *Liljeberg*, 486 U.S. at 868. By failing to explain its rationale, much less provide the relief requested, the Court of Appeals for the Fifth Circuit undermined the policy of encouraging scrutiny.

The rationale for the action of the Court of Appeals may never be known because this case may never be reviewed on direct appeal. The proposed MCorp plan provides for the immediate payment of substantially all of MCorp's assets to other creditors without reserving funds for the possibility that Petitioner's claims may be allowed on appeal in a larger amount than is estimated by the District Judge. Thus, absent a stay of the plan's

distribution, under the mootness doctrine Petitioner may be denied the opportunity for review of the disqualification issue. *Halliburton Service v. Crystal Oil Co. (In re Crystal Oil Co.)*, 854 F.2d 79 (5th Cir. 1988); *Miami Ctr. Ltd. Partnership v. Bank of New York*, 820 F.2d 376 (11th Cir. 1987). The Declarations filed with the Court of Appeals indicate the District Judge intends to approve payment to creditors as quickly as possible to moot Principal Mutual's appeal. *(Burke, Waterfall and Gorman Declarations).* It is unrealistic to expect any stay of the plan distribution from the District Court, and it will be difficult to obtain a stay from the Court of Appeals in such a large, complex case.

III. THE DECISION OF THE COURT OF APPEALS NOT TO ISSUE FINDINGS OF FACT AND CONCLUSIONS OF LAW MAY CONFLICT WITH A DECISION BY THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

In *Thornton v. Corcoran*, 407 F.2d 695 (D.C. Cir. 1969), the Court of Appeals for the District of Columbia published its rationale for denying a petition for writ of mandamus. The D.C. Circuit had ordered responses to a petition for writ of mandamus, and the Court construed *Will v. United States*, 389 U.S. 90 (1967), as requiring findings of fact and conclusions of law. *Thornton*, 407 F.2d at 698. As in this case, the *Thornton* case involved interpretation of a constitutional issue. The District of Columbia Circuit explained that the parties were entitled to

know the basis of its decision: that the request for mandamus had been denied because no constitutional violation had occurred. *Thornton*, 407 F.2d at 698.

CONCLUSION

Under the facts of this case, the appellate court's supervisory and instructive role in the mandamus process was not served, *Will*, 389 U.S. 90, 107 (1967), and this role is especially important in a disqualification case because the statutes are designed to promote public confidence in the judiciary. If the public cannot know the reasoning of the Court of Appeals, they may conclude that judges are immune from appellate court supervision and the public's confidence in the judiciary will be harmed. Petitioner requests that this Court grant the petition for writ of certiorari and require the Court of Appeals to explain its rationale for denying the writ. Petitioner believes that requiring the Court of Appeals to issue findings of fact and conclusions of law will result in

reconsideration of the petition and ultimate reversal of the decision.

DATED: May 27, 1993.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2212

IN RE: PRINCIPAL MUTUAL LIFE INSURANCE COMPANY,

Petitioner.

Petition for Writ of Mandamus and/or Prohibition to the United States District Court for the Southern District of Texas

---

(Filed Mar. 23, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus and/or prohibition requiring disqualification is DENIED for the reasons stated in open court. Judge DeMoss would grant the writ in part, as explained in open court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2213

IN RE: PRINCIPAL MUTUAL LIFE INSURANCE COMPANY,

Petitioner.

Petition for Writ of Mandamus and/or Prohibition to the United States District Court for the Southern District of Texas

---

(Filed Mar. 23, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus and/or prohibition to stay proceedings in or related to the bankruptcy cases pending this court's determination of the petition for writ of mandamus and/or prohibition requiring disqualification is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2212

IN RE: PRINCIPAL MUTUAL LIFE INSURANCE COMPANY,

Petitioner.

Petition for Writ of Mandamus to the United States District Court for the Southern District of Texas

---

(Filed Apr. 12, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for rehearing is DENIED.

DISTRICT COURT'S ORAL FINDINGS AND ORDER DENYING PRINCIPAL MUTUAL'S MOTION FOR RECUSAL. [EXCERPT FROM TRANSCRIPT OF MARCH 15, 1993, P. 48 AT 20-25; P. 49; P. 50 AT 1-11]

THE COURT: I did not learn anything from Principal Mutual. Well, that's not true. I learned from Principal Mutual that it considered intransigent litigation to be in its interest above a mediated reconciliation with people who have as large as or greater stakes than it does in the estate of the debtor.

I did not learn of any of Principal Mutual's real world, real time economic interests because it chose not to participate.

It is a matter of legitimate public conern when some parties have access to the Court or the proceedings are not properly recorded. But like all general principles, even that has exceptions. And one of those exceptions is when the parties feel it would be useful to discuss the case off the record, and there is no prompt objection by anybody with a legitimate interest.

Were the reasonable person to know the facts of this litigation to be fully apprised of the Court's role and its interest, whether from the standpoint of simply the economic condition of Texas, its having to contribute to the cost, its having to contribute to the FDIC through increased costs of banking, or just as civic observer, it could not sanely conclude that this Court had done anything but adhere to its responsibilities and to attempt reasonably and impartially to administer justice which required extraordinary measures in this case.

The motion to recuse is denied.

MR. FLOWERS: Judge, will you certify that as an interlocutory order so that we might appeal it and stay the proceedings for a short while so we can go to the Circuit on this issue?

THE COURT: There is no reasonable basis for a stay of litigation which is four years old, which involves hundreds of parties and people beyond Principal Mutual, thousands of issues, and which Principal Mutual has one of them.

To stay the progress of this litigation while it attempts to achieve some short-term benefit by denigrating the Court, and adding to the expense of all parties.

The motion to declare that there is no just reason to delay the appeal of that motion, one out of 10,000 that people made, won and lost in this case, is denied. The motion to stay these proceedings is received incredibly and denied. These proceedings will continue.

U.S. Const. amend. V

"No person . . . shall be deprived of life, liberty, or property, without due process of law." *U.S. Const. amend. V.*

28 U.S.C. § 144

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 144.

28 U.S.C. § 455(a),(b)(1),(e)

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall disqualify himself in the following circumstances:

> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .
>
> * * *
>
> (e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated under subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. § 455(a),(b)(1),(e).

Code of Conduct for United States Judges, Canon 3(A)(4) (1992)

CANON 3

A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE IMPARTIALLY AND DILIGENTLY

The judicial duties of a judge take precedence over all other acitvities. In performing the duties prescribed by law, the judge should adhere to the following standards:

A. Adjudicative Responsibilities.

* * *

(4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to the law, and, except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding. A judge may, however, obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

OPPOSITION BRIEF

BEST AVAILABLE COPY

No. 92-1893

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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No. 92-1893

In The

Supreme Court of the United States

October Term, 1992

PRINCIPAL MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

MCORP,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The decisions of the court of appeals are unreported. (Pet. App. at A1-A3.)

STATEMENT OF JURISDICTION

The Fifth Circuit entered its order denying Principal Mutual's petition for rehearing on April 12, 1993. Principal Mutual Life Insurance Company ("Principal Mutual") filed its petition for writ

of certiorari on May 27, 1993. Although Principal Mutual alleges alternative bases for jurisdiction under 28 U.S.C. §§ 1254(1) and 1651(a), MCorp contends that Principal Mutual may invoke this Court's jurisdiction only under 28 U.S.C. § 1651(a).

STATEMENT OF THE CASE

Principal Mutual filed petitions for writs of mandamus and prohibition in the United States Court of Appeals for the Fifth Circuit seeking an order compelling the Honorable Lynn N. Hughes, United States District Judge ("Judge Hughes"), to recuse himself from all MCorp proceedings, including an estimation of Principal Mutual's claims that he had begun under 11 U.S.C. § 502(c). Principal Mutual filed those petitions after Judge Hughes refused to disqualify himself. Following the emergency hearing requested by Principal Mutual, the Fifth Circuit denied Principal Mutual's requests for extraordinary relief and orally explained its reasons in open court for denying the writs.

STATEMENT OF FACTS

MCorp and its affiliates have operated under Chapter 11 of the Bankruptcy Code since March 31, 1989. A confirmation hearing on plans proposed by MCorp, its debtor affiliates, the Official Unsecured Creditors' Committee, and certain Senior Noteholders of MCorp is scheduled to begin on July 7, 1993. Certain subordinated creditors oppose confirmation of the plans.

Principal Mutual holds a contingent and unliquidated claim against MCorp's estate, which MCorp and its major constituencies believe is grossly overstated. The size of Principal Mutual's claim creates uncertainty, potentially affecting the recovery of other creditors.

At the request of various creditors, Judge Hughes attempted to

forge a consensual plan. In attempting to forge a consensus between senior and subordinated creditors, Judge Hughes did not exclude Principal Mutual from participating in any settlement discussions or conferences. (Resp. App. at 1a-3a.) Principal Mutual elected not to participate. (*Id.*) Following the conclusion of plan negotiations, Principal Mutual filed its petitions for writs of mandamus and prohibition in the Fifth Circuit.

MCorp disagrees with Principal Mutual's representation of the facts on many points, but believes that these points are irrelevant to this Court's determination of whether the requested relief should be granted.

SUMMARY OF ARGUMENT

Principal Mutual's petition for writ of certiorari is both procedurally and substantively deficient and should be denied. Principal Mutual should have filed a petition for writ of mandamus seeking to compel the Appellate Judges to issue written findings and conclusions. Principal Mutual is not seeking a review of the merits of any order. As is plain on the face of the Fifth Circuit's order denying Principal Mutual's petitions, the question presented by Principal Mutual — whether an appellate court must "explain" to the public its rationale for refusing to disqualify a federal judge — is not even in controversy. Each of the Appellate Judges offered a thorough explanation of the reasons for his decision in open court.

Assuming that Principal Mutual could seek its requested relief by a petition for writ of certiorari without serving the appellate judges, the writ should be denied. No opinion of this Court or any court of appeals supports the proposition that the Fifth Circuit must issue written findings and conclusions in denying a mandamus petition.

The decision whether to issue written findings and conclusions is a discretionary one subject to review for abuse of discretion. Principal Mutual cannot establish that the Fifth Circuit abused its discretion, because it has an inadequate record to support appellate review.

The Fifth Circuit's local rules require a party desiring a transcript to make its own arrangements in advance of the proceedings.[1] Principal Mutual neglected to make those arrangements. Principal Mutual now seeks to remedy its procedural oversight by asking this Court to compel the Appellate Judges to issue written findings and conclusions in support of their denial of mandamus relief.

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1. Rule 34.7 provides:

> *Recording of Oral Arguments.* Oral arguments in all cases are tape recorded for the exclusive use of the court. Copies of the tapes or transcripts thereof cannot be prepared and furnished to counsel or the parties nor will counsel be permitted to listen to the tape. However, with the advance approval of the Court counsel may arrange at their own expense for a qualified court reporter to be present to record and transcribe the oral argument.

5th Cir. R. 34.7.

REASONS FOR DENYING THE WRIT

I.

THE PETITION IS PROCEDURALLY DEFICIENT.

A. Principal Mutual Filed the Wrong Writ.

Principal Mutual has sought relief from this Court by incorrect means.[2] Principal Mutual should have filed a petition for writ of mandamus. Principal Mutual, apparently, is attempting to avoid the strict standard applied to a mandamus petition through seeking review by writ of certiorari.[3]

Principal Mutual does not seek review of the merits of any order. Principal Mutual, instead, asks this Court to compel the Fifth Circuit to issue written "findings of fact and conclusions of law" explaining its reasons for denying Principal Mutual's petitions.

B. Neither the Fifth Circuit Judges Nor the Solicitor General Have Been Served With Principal Mutual's Petition.

The Honorable Judges Patrick E. Higginbotham, Jerry E.

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2. A petition for writ of certiorari seeks review of errors in an order or judgment below, whereas "the office of a '*mandamus*' is to require the lower court or judge to act." *NAACP v. Alabama*, 357 U.S. 449, 456 (1958) (emphasis added); *see also* Sup. Ct. Rs. 11, 12.4, 13.1, 13.4, 14.1(b), 14.1(e)(i)(iv), 14.1(i) and 14.1(k) (indicating that the purpose of a petition for certiorari is to review a judgment).

3. This Court has stated that: (1) "the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations," *Allied Chem. Corp. v. Daiflon Inc.*, 449 U.S. 33, 35 (1980); (2) the party seeking mandamus has the burden of proving a "clear and indisputable right" to it, *id.* at 37; and (3) matters of discretion are not subject to mandamus relief. *Id.*; *accord Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665-66 (1978).

Smith, and Harold R. DeMoss, Jr. of the United States Court of Appeals for the Fifth Circuit (the "Appellate Judges") should have been named the respondents in these proceedings. Sup. Ct. R. 20.3(b). The appellate judges were not served as the named respondents, or even as interested parties. Sup. Ct. R. 20.3(b), 29.3. This Court may not exercise jurisdiction over the Appellate Judges, or grant Principal Mutual's requested relief, until Principal Mutual has served them. *See Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 428 (1978) (dismissed for failure to serve "the judge or judges to whom the writ is sought to be directed").

In addition, Principal Mutual failed to serve the Solicitor General. Sup. Ct. R. 29.4(a). In the proceedings below, Principal Mutual sought to disqualify Judge Hughes. Consistent with Fifth Circuit practice, Judge Hughes filed his own response and was represented pro forma by counsel for the parties opposing the petition, including MCorp, the Official Unsecured Creditors' Committee, certain Senior Noteholders of MCorp, and the Federal Deposit Insurance Corporation.[4] In this proceeding, however, Principal Mutual should have served the Appellate Judges and Judge Hughes, officers or employees of the United States government, by serving the Solicitor General. Sup. Ct. R. 29.4(a).

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4. Rule 21, in part, provides:

> *Petition for Writ.* A petition for writ of mandamus writ of prohibition, or other extraordinary writ shall not bear the name of the District Judge, but shall be entitled, In re: _____, Petitioner. To the extent that relief is requested of a particular Judge, unless otherwise ordered, the Judge shall be represented pro forma by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the Judge.

5th Cir. R. 21.

C. The Petition Misnames MCorp as the Respondent.

MCorp is not the proper named respondent. Sup. Ct. R. 20.3(b). MCorp has no influence over the Fifth Circuit's opinion writing practices.

II.

THE PETITION IS SUBSTANTIVELY DEFICIENT.

A. The Issue Presented by Principal Mutual Is Not in Controversy.

In its "Question Presented," Principal Mutual asks whether an appellate court must "explain" to the public its rationale for refusing to disqualify a federal judge. This point is not in controversy. The Fifth Circuit did explain its rationale for refusing to disqualify Judge Hughes orally from the bench at the emergency hearing on Principal Mutual's petitions. The absence of controversy on this point is plain from the face of the Fifth Circuit's written order, which states: "the petition for writ of mandamus and/or prohibition requiring disqualification is *DENIED for the reasons stated in open court.*" (Pet. App. at A-1) (emphasis added).

Due to the emergency nature of Principal Mutual's extraordinary request for relief, the Appellate Judges responded promptly by requesting briefs, setting oral argument, and immediately delivering their decision so that the bankruptcy and estimation proceedings pending before Judge Hughes could continue without disruption. Each of the Appellate Judges offered a thorough explanation of the reasons for his decision in open court.

B. Principal Mutual Has Failed to Establish That the Appellate Judges Abused Their Discretion.

The only controversy raised by Principal Mutual in this Court

is whether the Fifth Circuit should be compelled to issue written findings of fact and conclusions of law. This controversy should have been raised by a petition for writ of mandamus, but Principal Mutual does not have a "clear and indisputable" right to its requested relief. *Allied Chem. Corp.*, 449 U.S. at 35.

The decision whether to issue written findings of fact and conclusions of law is committed to the Fifth Circuit's sound discretion, and if the decision is subject to appellate review, it is reviewed only for an abuse of discretion. *Allen & O'Hara, Inc. v. Barrett Wrecking, Inc.*, 898 F.2d 512, 517 (7th Cir. 1990) (court acts within its discretion when it decides not to issue a written explanation of its decision).

Principal Mutual cannot establish that the Fifth Circuit abused its discretion, because it has no record of the proceedings in the Fifth Circuit as a result of its own neglect. Inasmuch as Principal Mutual cannot make the necessary showing of abuse of discretion, the writ should be denied. *Kerr v. United States Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976); *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964).

C. The Fifth Circuit's Actions Are Not in Conflict With the Decisions of This Court or the Decisions of Any Other Court of Appeals.

Even if Principal Mutual could seek relief by a petition for writ of certiorari, the writ should be denied. Principal Mutual has cited no authority requiring an appellate court to issue written findings and conclusions upon denying a mandamus petition. Indeed, this Court and the courts of appeal routinely deny mandamus petitions without issuing written opinions.[5]

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5. *See, e.g., In re Herrera*, No. 92-8322, 1993 WL 122904 (U.S. June 14, 1993) (mandamus denied without opinion); *In re Bostic*, No. 92-8324, 1993 WL 122906 (U.S. June 14, 1993) (same); *In re Leuellyn*, 1993 WL 188358 (U.S. June

(Cont'd)

Contrary to Principal Mutual's arguments, this Court has never issued an opinion requiring the courts of appeals to issue written findings and conclusions in denying mandamus relief. In addition, no conflict exists among the circuits on the question of whether an appeals court must issue written findings and conclusions in denying a writ of mandamus. Even Principal Mutual recognizes that the cases it has relied on are readily distinguishable.

In summarizing its reasons for granting the writ, Principal Mutual virtually concedes that the Fifth Circuit's decision does not conflict with any decision of this Court or with the decision of any other circuit. Although recognizing that "this Court has not specifically addressed the issue," (Pet. at 6), Principal Mutual weakly argues that a writ should be granted, because it can identify a conflict with the "rationale" gleaned from dicta in decisions involving inapposite facts.

Principal Mutual erroneously suggests that *Will v. United States*, 389 U.S. 90 (1967), and *Thornton v. Corcoran*, 407 F.2d 695 (D.C. Cir. 1969), "appear to conflict" with the Appellate Judges' actions. Both *Will* and *Thornton* state that mandamus is such a "drastic and extraordinary" remedy that a court should not grant such relief without "a reasoned exposition of the basis for its action." *Will*, 389 U.S. at 106-07; *accord Thornton*, 407 F.2d at 698. *Will* stands for the proposition that extraordinary relief should not be granted "from the blue without rationale." *Will*, 389 U.S. at 107. Principal Mutual misplaces reliance on the prudent counsel in

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(Cont'd)

7, 1993) (same); *In re Mosby*, No. 92-8357, 1993 WL 137023 (U.S. June 7, 1993) (same); *In re Todd*, 113 S. Ct. 1882 (1993) (same); *see also Mallard v. United States Dist. Court for S. Dist. of Iowa*, 490 U.S. 296 (1989) (noting that "[t]he Court of Appeals denied the [mandamus] petition without opinion"); *Kerr v. United States Dist. Court for N. Dist. of Cal.*, 426 U.S. 394 (1976) (same); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) (same).

Will. It does not follow from *Will* that a refusal to issue a writ of mandamus requires a written explanation. Likewise, nothing stated in *Thornton* suggests that the denial of a mandamus petition must be reduced to written findings and conclusions.

Principal Mutual misperceives the purpose of an extraordinary writ. In those rare instances where there has been a usurpation of judicial authority justifying issuance of a writ of mandamus, it is not unreasonable to require the appellate court to explain the reasons supporting extraordinary relief.[6] In that situation, the lower court needs explicit instructions or it would not have erred in the first place. Unlike the granting of a mandamus, the denial of a mandamus petition is not a "drastic and extraordinary" action requiring written instructions. There is not necessarily a reason to explain why remedial action is *not* needed.

D. A Writ Should Not Be Granted to Remedy Principal Mutual's Failure to Comply With the Fifth Circuit's Local Rules.

This Court should not grant the writ to remedy Principal Mutual's own procedural errors. Principal Mutual's real problem is that the record is inadequate to support the issuance of a writ of mandamus or even to permit appellate review by this Court.

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6. In *Will*, the Supreme Court identified the burden of the appeals court in granting a writ of mandamus:

> Due regard, not merely for the reviewing functions of this Court, but for the "drastic and extraordinary" remedy (citation omitted) and for the extremely awkward position in which it places the District Judge (citation omitted) demands that a court issuing the writ give a reasoned exposition of the basis for its action.

Will, 389 U.S. at 106-07.

Duffy v. Dier, 465 F.2d 416 (8th Cir. 1972).[7] Principal Mutual's oversight caused this result.

The Fifth Circuit's Local Rules provide that "counsel may arrange at their own expense for a qualified court reporter to be present to record and transcribe the oral argument." 5th Cir. R. 34.7. Principal Mutual neglected to adhere to the Local Rules by failing to arrange for the recording and transcription of the oral argument and the Fifth Circuit's orally rendered findings and conclusions.

Ignoring its own procedural oversight, Principal Mutual now unnecessarily multiplies the proceedings by asking this Court to compel the Appellate Judges, who were not even named as respondents, to issue written findings and conclusions. Principal Mutual has effectively waived its right (if the right ever existed) to the remedy it seeks. If Principal Mutual wanted a written record of the proceedings adequate to support appellate review, it was required to comply with the Fifth Circuit's Local Rules.

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7. Principal Mutual's interpretation of *Will* and *Thornton* is inconsistent with the only pertinent circuit court decision. In *Duffy v. Dier,* the Eighth Circuit stated:

> As the Supreme Court emphasized in *Will,* the issuance of mandamus must be accompanied by "findings of fact by the issuing court and some statement of the court's legal reasoning." *Will v. United States,* 389 U.S. 90, 107, 88 S. Ct. 269, 280, 19 L. Ed. 2d 305 (1967). Such findings and conclusions cannot be made upon the basis of the present cryptic record and to that extent mandamus is not a proper remedy. *See Thornton v. Corcoran,* 132 U.S. App. D.C. 232, 407 F.2d 695, 698 (1969).

465 F.2d at 418.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — EXCERPT FROM TRANSCRIPT OF MARCH 15, 1993 ON MOTION FOR RECUSAL, *IN RE MCORP* (CIVIL ACTION NO. H-93-395), P. 36 AT LINES 10-25, P. 37, P. 38 AT LINES 1-4, P. 43 AT LINES 2-25, P. 44 AT LINES 1-4

* * *

[36] [The Court:] Were you here when we had a hearing and Mr. Rosenberg suggested that counsel ought to report periodically, and then after a couple of weeks of that, at one of those meetings, he suggested that the principals ought to be invited to attend?

MR. FLOWERS: Judge, I didn't attend every one of those sessions and I don't recall. I don't recall specifically Mr. Rosenberg saying that. I can't say whether I was here or not.

THE COURT: So in your motion where you say all these meetings took place except for Principal Mutual, that was by Principal Mutual's choice. The order of the Court was Mr. Seider and Ms. Gray had to be here every other day for the rest of their natural lives to report on the progress of the settlement discussions. All other counsel were welcome to attend any or all of them. That transcript I didn't see [37] attached to your motion.

MR. FLOWERS: We have ordered — we have not received all of the transcripts. I believe we have ordered them all. We have tried to order them all. But we have not received all of them.

THE COURT: Then Wednesday, 10 days ago, you appeared at one of those gatherings to make one of the same objections you make in these papers. That apparently is when you believe you learned that the principals had been mediating.

And then you chose again not to participate in the alternate

day sessions, and Principal Mutual chose not to participate, and then when they had negotiations and were personally invited to participate, they chose not to participate. Is that correct?

MR. FLOWERS: Yes, sir.

THE COURT: Not any secrets. It's all been done. Now I'll admit a couple of the reports by Mr. Seider and Ms. Gray I think have not been reported, and if that is the case, it was because [of] my oversight in making sure I had the reporter. And I can't imagine anything substantively was accomplished at any of them or we wouldn't have kept going.

And it is your client's motion that this Court recuse itself from all MCorp proceedings?

MR. FLOWERS: Yes, sir.

THE COURT: So the fact that Principal Mutual chose [38] not to attend the sessions should then prejudice every other litigant to this case to wipe out the institutional memory of four years of what I think everybody would admit has been vigorous proceedings? That's your client's position?

* * *

[43] THE COURT: And you were again invited to join, as you had been earlier. And it's real hard to freeze somebody out if they don't want to play.

MR. FLOWERS: May I respond to that, Judge? Judge, the sequence of events was that after that very first hearing when you

told the parties to negotiate, Mr. Berry and I were here, and we talked to both Mr. Baker and Mr. Seider.

And we were told that the juniors and the seniors wanted to talk, and that they would call us, if they could make a deal, that that was the most important thing.

That was essentially the last — we touched base with them a time or two, but that was essentially the last time we really had any discussions about that. We never heard anything.

We were under the impression — at least I was personally under the impression that the parties were down here meeting in some room trying to negotiate their differences and reporting to you periodically.

It was not until March 3 hearing that I got the first inkling that the Court was actually meeting with the parties and mediating the settlement.

THE COURT: And you still didn't join either the counsel conferences or the next of principal conferences. The point is quite simply nobody has ever excluded you or your [44] client from anything that I am aware. I certainly have never excluded you or your client from anything.

MR. FLOWERS: It's true, Judge, that on the 12th, you offered us the opportunity.

* * *